WILLIAM AND PEARL HAYES

IBLA 86-928 Decided February 2, 1988

Appeal from a decision of the Colorado State Office, Bureau of Land Management, denying a protest of a mineral claimant's bond tendered pursuant to 43 U.S.C. § 299 (1982). CMC 208388 - CMC 208393.

Affirmed in part, set aside in part, and remanded.

1. Act of December 29, 1916--Mineral Lands: Mineral Reservation--Mining Claims: Surface Uses--Rules of Practice: Protests--Stock-Raising Homesteads

In determining the sufficiency of the amount of a bond tendered by a mineral claimant pursuant to 43 U.S.C. § 299 (1982), BLM must evaluate possible damages to the surface estate on the basis of the value of the crops, permanent improvements, and use of the land for grazing purposes within the limits of the mining claims, and not on the basis of the mineral claimant's proposed activities on the patented lands.

APPEARANCES: Gerald D. Sjaastad, Esq., Colorado Springs, Colorado, for appellants; James K. Aronstein, Esq., Denver, Colorado, for Alma American Mining Corporation.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

William and Pearl Hayes have appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated March 6, 1986, denying their protest of the amount of the bond required of mineral claimants for protection of their rights as the surface owners. Appellants are the surface owners of lands situated in sec. 21, T. 15 S., R. 73 W., sixth principal meridian, in Park County, Colorado. These lands were patented to appellants' predecessor-in-interest under the Stock-Raising Homestead Act of 1916 (SRHA), 39 State 846. 1/ The SRHA reserved to the United States all mineral interests in lands patented under its provisions.

1/ Repealed by the Federal Land Policy and Management Act of 1976, P.L. 94-579, § 702, 90 State 2743, 2787.

Alma American Mining Corporation (Alma) is the locator of six lode mining claims located on the land in question. 2/ On August 8, 1985, Alma served appellants a copy of the Bond for Mineral Claimants (Form 3814-1) it had filed with BLM. The bond was in the amount of $1,000, for the benefit of the appellants. Subsequently, appellants filed a protest of the amount of the bond and, on October 10, 1985, BLM conducted a field examination to determine the possible extent of areal disturbance by Alma's proposed exploration plan. An October 11, 1985, memorandum from the BLM area manager to the BLM district manager disclosed the following assessment of the value of improvements and grazing forage on the land to be disturbed by the proposed exploration: "The disturbance may * * * range between .1 and .6 acre. Grazing appears to be the only potential use."

After making its analysis of the impacts of Alma's mining activities, BLM issued the decision of March 6, 1986, which is the subject of this appeal. In dismissing appellants' protest, BLM affirmed the bond amount of $1,000 and rejected appellants' argument that the mining claims were invalid, noting that appellants had the option of bringing a private contest under 43 CFR 4.450.

In their statement of reasons for appeal, appellants take issue with the BLM rejection of their argument that the claims should be declared invalid. They further allege that BLM erred in concluding that a bond in the amount of $1,000 was sufficient to cover possible damages to appellants' property. 3/

The BLM decision must be affirmed to the extent it declined to adjudicate the validity of Alma's mining claims in response to appellants' protest. As the Board has stated:

> A determination of the validity of a mining claim on the issue of whether a discovery of a valuable mineral deposit has been made requires a contest proceeding embracing notice to the claimant and an opportunity for a hearing. See United States v. Zimmers, 44 IBLA 142 (1979). * * * It is well established that the stock-raising homestead patentee or his successor in interest, as holder of title to the land except for the reserved minerals, has standing to challenge the validity of a mining claim on the patented land for lack of discovery of a valuable

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2/ Alma originally located nine claims. It abandoned three of the claims when BLM determined that portions of the three claims had been located on lands not subject to mineral location.

3/ Appellants also take issue with BLM's statement in the decision that all those present at a field examination, including one of the appellants, "agreed * * * that the exploration proposed by Alma * * * would not exceed $1,000 in damage to the land." Appellants counter that they in no way expressed such agreement. In light of our resolution of this case and the fact appellants have set forth their objections to the bond amount both in their protest and their appeal, we find the BLM assertion that appellants agreed to the amount of damages does not affect the review of this appeal.

> mineral deposit by initiation of a private contest pursuant to 43 CFR 4.450-1. Joanne M. Massirio v. Western Hills Mining Association, 78 IBLA 155, 157 (1983). Since a validity determination on the issue of discovery involves the elements of a contest, it could not properly be decided in response to appellants' protest of the bond. 43 CFR 4.450-2; see Elmer Silvera, 42 IBLA 11, 16 (1979).

Robert M. Michael, 79 IBLA 255, 256-57 (1984).

[1] We now address appellants' argument that the bond amount was insufficient to cover possible damages. As previously noted, all patents issued under SRHA contained a reservation to the United States of all minerals in the land together with the right to prospect for, mine, and remove the minerals. Section 9 of SRHA, 43 U.S.C. § 299 (1982), authorizes individuals "qualified to locate and enter * * * mineral deposits" to enter lands patented under SRHA for prospecting purposes provided they compensate the surface owner for any damages to crops or permanent improvements. Once the mineral prospector locates a claim, section 9 sets forth the conditions under which he can reenter the land:

> Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the sane, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate: * * *.

Thus, absent consent of or agreement with the surface owner, the mining claimant must, prior to re-entry, post bond for the compensatory protection of the surface owner. The bond amount need only be sufficient to

cover "damages to crops, improvements and the value of the land for grazing purposes." 4/ Elmer Silvera, supra at 15. See also United States v. Browne Tankersley-Trust, 98 IBLA 325 (1987).

In making its determination concerning the adequacy of the bond tendered by Alma, BLM properly limited its consideration to possible damages to crops, improvements, and grazing values. However, BLM further limited the scope of its review in this case by considering only the patented lands within the mining claims that would be damaged by Alma's initial exploration activities. For reasons explained below, we find this further limitation on the bond sufficiency evaluation to be in error.

In submitting the bond for re-entry, Alma proposed only to re-enter to drill three or four exploration drill holes with an area disturbance estimated at less than 1 acre (Oct. 11, 1985, Memorandum from BLM Area Manager to BLM District Manager). As noted above, BLM considered only the damage to the proposed exploration area in determining the adequacy of the bond:

> Grazing appears to be the only potential use. The vegetation was described * * * as consisting primarily of blue grama, Arizona fescue, mountain muhly, and western wheatgrass with some other minor grasses and forbs. Based on historical use, this area requires 10 acres to support one AUM [animal unit month]. Assuming 3 years of nonutilization over the .6 acre a total of less than one AUM would be lost to the surface owner. Private lease rates are currently $6 to $7 per AUM, therefore, the surface owner would be deprived of approximately $6 to $7 in potential income. The land does not appear to be currently grazed so this loss may not be realized.
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> We believe the $1,000 bond is more than sufficient to cover the loss of grazing fees. In addition, there were no fences, crops, nor other surface improvements observed in the area of the proposed drilling operations.

Id. The conclusion that the $1,000 bond was sufficient to cover damages from Alma's exploratory operations is further reflected in the decision rejecting appellants' protest:

> The Canon City District Manager approved the Royal Gorge Resource Area Manager's report stating that a bond in the amount of $1,000 would protect the land which would be disturbed by Alma American Mining Corporation's exploration plan. Therefore, the bond will be approved as to the land which will be disturbed by the exploration operation plan. If other lands are to be explored at a future

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4/ Section 9 of SRHA requires compensation only for crops and improvements. The Act of June 21, 1949, 63 Stat. 215, 30 U.S.C. § 54 (1982), added the requirement that the mineral entrant be liable for "any damage that may be caused to the value of the land for grazing."

date, the mineral claimants will have to post another surface protection bond to protect the additional lands.

The issue of what lands are to be considered in making a determination on the adequacy of a bond tendered under section 9 of the SHRA was addressed by the Board in A. J. Maurer, 15 IBLA 151, 81 I.D. 139 (1974), wherein a mineral claimant contested the amount of bond set by BLM. The claimant asserted that, because he intended to re-enter the patented land to do only prospecting and assessment work, the bond should have been minimal" in amount or not required at all. The Board disagreed, holding that

> [e]ven though Maurer presently intends to reenter only for prospecting (exploration) and assessment work " prior to reentry he must post the bonds required * * * . The Mining claimant is not permitted to engage in mining operations on the property until a bond in the amount set for the particular property is tendered and approved.

Id. at 156, 81 I.D. at 141. In a concurring opinion, Judge Thompson recognized that Maurer stood for the proposition that

> the amount of the bonds to be furnished by a locator of a mining claim asserting rights under the mining laws does not depend upon his proposed activities upon the patented land, but, rather, upon possible damages based upon the value of the crops and surface improvements of the surface owner within the mining claims, as required under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1970), and the grazing value of the land, as required by the Act of June 21, 1949, 30 U.S.C. § 54 (1970). See L. W. Hansen, A-31029 (December 30, 1968).

Id. at 157, 81 I.D. at 142-43.

The basis for Judge Thompson's statement can be found in section 9 of SRHA. As the Colorado Supreme Court has noted, the clear purpose of section 9 is not to restrict exploration and mining operations on lands patented under SRHA, but to ensure compensatory protection to the surface owner. McMullin v. Magnuson, 78 P.2d 964, 973 (Colo. 1938). The bond evaluation method employed by BLM in this case runs contrary to the express provisions of section 9; it has the potential to restrict the mineral claimant's right to re-entry and fails to adequately protect the surface owner.

The method employed by BLM in this case to evaluate the sufficiency of the tendered bond amount would require (as acknowledged in the decision rejecting appellants' protest) the mineral claimant to return for further review of the bond amount each time it proposed new mining activities on appellants' lands. This result, however, is contrary to the statutory scheme established in section 9, which states that upon bond approval the mineral claimant has the right to "reenter and occupy so much of the surface * * * as may be required for all purposes reasonably incident to the mining or removal

of the minerals." Thus, BLM's requirement to return for further review of the bond amount is in essence a restriction that does not comport with the right of re-entry "for all purposes reasonably incident to mining" granted by section 9 once bond has been posted.

BLM's decision to limit its examination of damages to Alma's proposed exploration activities also fails to provide the full protection afforded a surface owner under section 9. It is true that the bond amount for re entry does not have to be sufficient to cover damages outside the limits of the mining claims. Elmer Silvera, supra; L. W. Hansen, supra. However, implicit in this holding is the understanding that the bond mount must be sufficient to cover possible damages within the boundaries of the claims. Thus, in determining the sufficiency of bond, BLM must estimate possible damages to crops, permanent improvements, and the grazing value of the land within the boundaries of the mining claims located by the mineral claimant. Such an evaluation is properly based on the type or types of minerals located, the mining methods proposed or normally used to develop such mineral deposits, and the damage to crops, improvements, and grazing value that could be associated with the types of methods to be employed. Since this was not done here, the decision accepting the bond must be set aside.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside in part. The case is remanded to BLM for a re-examination of the sufficiency of the bond amount consistent with the principles set forth herein. 5/

James L. Burski
Administrative Judge

We concur:

C. Randall Grant
Administrative Judge

Anita Vogt
Administrative Judge
Alternate Member

5/ In setting aside the BLM decision, we do not hold that the $1,000 bond amount is per se insufficient. The determination on the sufficiency of the bond amount is to be made after an evaluation of the possible damage to SRHA-patented lands within Alma's mining claims. We note, however, that a memorandum from the Acting District Manager, Canon City, to the Deputy State Director for Operations dated Dec. 12, 1985, admitted that "assuming the entire area with mining claims would be disturbed or destroyed by mining activities, a significantly different estimate of damage would result."